Supreme Court, U. S.
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In The

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1683

YELLOW FREIGHT SYSTEM, INC.,
Petitioner,

vs.

SECRETARY OF LABOR AND OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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In The

Supreme Court of the United States

OCTOBER TERM, 1975

No. _____

YELLOW FREIGHT SYSTEM, INC.,
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vs.

SECRETARY OF LABOR AND OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Petitioner, Yellow Freight System, Inc., respectfully prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the District of Columbia Circuit entered in this cause on February 20, 1976.

OPINION BELOW

The decision of the Court below is not yet reported. The opinion is reproduced in Appendix A, p. A1, infra. Appendix B is a reproduction of the Occupational Safety and Health Review Commission's decision and Appendix C is a reproduction of the Administrative Law Judge's Decision and Order.

JURISDICTION

The decision of the Court of Appeals was entered on February 20, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS FOR REVIEW

I

Is the Occupational Safety and Health Act, 29 U.S.C. § 651, et seq., in contravention of the Sixth and Seventh Amendments to the Constitution in that it provides for criminal penalties and civil judgments in excess of twenty dollars without allowing defendant employers the right of a trial by jury?

II

Do the provisions of the Occupational Safety and Health Act and the regulations promulgated thereunder require that all employers provide and require the use of personal protective equipment wherever there is only remote possibility of injury without regard to the existence of an actual hazard, the likelihood of injury, the nature and extent of possible injuries, or the cost, inconvenience, and desirability of the protective equipment involved?

A. Do the provisions of 29 C.F.R. 1910.132(a) require the use of personal protective equipment by employees absent a reference to an objective standard of conduct?

B. Is an employer denied due process of law when a regulatory agency promulgates a standard that is so vague and indefinite that it fails to advise the employer that he is covered or what conduct is mandated or proscribed?

C. Does an administrative agency exceed its scope of authority or act in an arbitrary manner when it either uses the adjudicatory process to create and apply industry standards rather than following the rule making procedures set forth in its enabling legislation or fails to follow its own prior decisions?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional Provisions involved are:

Fifth Amendment to the Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment to the Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtain-

ing witnesses in his favor, and to have the assistance of counsel for his defense.

Seventh Amendment to the Constitution:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

The Federal Statutes involved are:

Occupational Safety and Health Act § 5, 84 Stat. 1593; 29 U.S.C. § 654(a):

(a) Each employer—

(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

(2) shall comply with occupational safety and health standards promulgated under this chapter.

Occupational Safety and Health Act § 6(b), 84 Stat. 1593, 29 U.S.C. § 655(b), see Appendix D

Occupational Safety and Health Act § 17, 84 Stat. 1606, 1607, 29 U.S.C. § 666, see Appendix E

STATEMENT OF THE CASE

Nature of the Case

This case arose out of a citation issued on March 13, 1973, by the United States Department of Labor, Occupational Safety and Health Administration, through

J. T. Knorpp, Area Director, to Yellow Freight System, Inc., 92nd and State Line Road, Kansas City, Missouri (hereinafter referred to as "Yellow"). Said citation alleged the violation of 29 C.F.R. 1910.132(a) (hereinafter "1910.132(a)"), which provides as follows:

> Protective equipment, including personal protective equipment for the eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of process or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.

The specific violation which Yellow was alleged to have committed was as follows:

> Protective equipment consisting of personal protective equipment for the feet was not provided and used where necessary by reason of hazard; i.e., safety shoes were not worn by drivers, hostlers, and checkers having exposure to foot injury.

The citation was issued pursuant to the Occupational Safety and Health Act of 1970, 29 U.S.C. Section 651, et seq. (hereinafter the "Act"). Yellow filed a timely notice of contest of the citation, which was issued at Yellow's freight terminal at 2319 North Harvard, Tulsa, Oklahoma, and in due course the matter came on for hearing before Administrative Law Judge William J. Risteau. In his decision dated October 16, 1973, Judge Risteau dismissed the citation. Thereafter the Secretary of Labor (hereinafter referred to as "Secre-

tary") appealed Judge Risteau's decision to the Occupational Safety and Health Review Commission, which took the matter on the briefs of the parties and reversed the Administrative Law Judge's decision on March 20, 1975. Yellow filed a timely petition for review to the United States Court of Appeals for the District of Columbia Circuit on May 14, 1975, which affirmed the decision of the Review Commission in a decision dated February 20, 1976.

The basis for Federal jurisdiction in the Court of the first instance, the United States Court of Appeals for the District of Columbia Circuit, is 29 U.S.C. 11(a).

Statement of Facts

Yellow Freight System, Inc., is a common carrier of freight in interstate commerce. As such it operates under authority granted by the Interstate Commerce Commission and further is subject to regulation by the Department of Transportation. In the conduct of its business as an interstate carrier, Yellow operates 151 terminals for the handling of freight throughout its multi-state system. One of these terminals is located in Tulsa, Oklahoma. The Tulsa terminal is the situs of the operations giving rise to the instant citation.

The inspection of Yellow's Tulsa terminal by Mr. Fred N. McKenzie of the Occupational Safety and Health Administration took place on February 28, 1973. Mr. McKenzie went to the terminal because the Occupational Safety and Health Administration had received a formal written complaint from an employee of the Tulsa terminal alleging "forklifts, check safety equipment, dangerous material on platform, no personal protection for handling dangerous freight, converter dollies

too heavy for one man to handle, trucks in bad condition, exhaust fumes and noise, no chock blocks for trucks." Mr. McKenzie issued no citations save in the personal protective equipment area. The citation was based upon Mr. McKenzie's personal judgment that safety shoes were required at the terminal and he had specifically in mind steel-toed safety shoes, which afford protection only to the toes. There was no evidence adduced at the hearing duly held before Administrative Law Judge Risteau that any employee at the Tulsa terminal ever sustained a toe injury requiring medical attention or resulting in any disability or loss of time.

REASONS FOR GRANTING THE WRIT

I

The Decision Below Is Based on a Citation That Was Issued Under an Act, 29 U.S.C. Section 651, Et Seq., That Is Unconstitutional Because It Provides for the Imposition of Criminal Penalties and Civil Penalties in Excess of Twenty Dollars Without Allowing Accused Employers the Right to a Trial by Jury.

The Sixth Amendment to the Constitution provides that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury. 29 U.S.C. Section 666(e), (f) and (g) provide for the imposition of criminal penalties, both fines and imprisonment, for certain violations of the Act. No provision is made for a jury trial, and accordingly the Section is on its face unconstitutional. The Supreme Court has held that "trial by jury in criminal cases is fundamental to the American scheme of justice." *Duncan* v. *Louisiana*, 391 U.S. 145 (1968); *Bloom* v. *Illinois*, 391 U.S. 194 (1968). The denial of a jury in criminal proceedings under the Act puts the integrity of the result

seriously at issue because it deprives the accused of the right to an independent finding of fact by a body of his peers, a right recognized as desirable and necessary since the Magna Carta.

The Act also falls afoul of the Seventh Amendment because it affords no right of trial by jury where the amount in controversy exceeds twenty dollars. Testimony before the Administrative Law Judge in the matter here at issue indicated that the cost of compliance with the citation would greatly exceed twenty dollars, and accordingly the right to a jury trial should have been, but was not, given to Yellow.

The reasoning behind Yellow's contention that it was denied its Constitutional right to a jury trial was clearly set forth by Judge Gibbons of the United States Court of Appeals for the Third Circuit in his dissenting opinion in *Frank Irey, Jr.* v. *OSHRC*, ... F.2d ..... Therein, Judge Gibbons stated:

> . . . I assume, as does the common consensus, that the seventh amendment applies to the entire judicial power of the United States to the extent that the exercise of that power involves suits at common law. I also assume, and I do not suppose the majority disagrees, that the seventh amendment binds the entire federal government, not merely the Article III courts. I also assume that Congress could not confer the entire diversity jurisdiction, including suits at common law, upon a non-Article III tribunal sitting without a jury. Nor, I suppose, would the case be different if Congress called those non-Article III adjudicators "administrators" rather than "judges."

* * *

> In my dissent to the panel's opinion, I attempted at some length to demonstrate that a proceeding, the sole object of which is the obtaining of an *in personam* money judgment, is a "Suit at common law" and thereby deserving of seventh amendment protection. I again dissent because I am unwilling to accept the majority's view that an Article III court charged with interpreting the Constitution's mandate must blindly defer to a Congressional direction that the proceeding below be labeled something else.

For the foregoing reasons, the Act is violative of the Sixth and Seventh Amendments to the Constitution.

II

The Meaning of 1910.132(a) Is Unclear and There Is a Conflict Among Four Circuit Courts of Appeals Because Those Courts Have Applied Varying and Inconsistent External Tests to Attempt to Arrive at a Valid Construction of That Standard.

With the exception of the "general duty clause" of the Act, no part of the occupational safety and health regulatory scheme has an application more broad than 1910.132(a). All employers and employees are covered. The only conditions which need exist for the standard to apply are the existence of some hazard (a term not defined) and the availability of some item which might reduce the hazard.

Since there is no employee who is not exposed to some type of "hazard" and since there is a boundless variety of types of clothing, shoes, gloves, hats, glasses, and similar equipment available, every employee in the

county is subject to some possibly injurious condition which might be improved if that employee were differently outfitted or equipped. In view of the breadth of impact of 1910.132(a), the public is entitled to guidance as to the meaning of that regulation.

The Courts of Appeals which have attempted to state what 1910.132(a) means have disagreed on the standard to be applied.

In *Ryder Truck Lines, Inc.* v. *OSHRC*, 497 F.2d 230 (5th Cir. 1974), the Fifth Circuit held that the standard was vague on its face but not in its application where the existence of a hazard was known and could be proved from the employer's own history of injuries resulting in lost time from work.

In *Cape and Vineyard Division, New Bedford Gas and Elec. Co.* v. *OSHRC*, 512 F.2d 1148 (1st Cir. 1975), the First Circuit held that a violation of 1910.132(a) could only be based upon a showing that an employer knew of the existence of the hazard or that one knowledgeable of practices in the industry testified that the industry recognized the hazard.

In *Arkansas Best Freight System, Inc.* v. *OSHRC*, (8th Cir. 1976), the Eighth Circuit held that factual proof of a hazard was unnecessary to show noncompliance with 1910.132(a) and that the sole test was "foreseeability."

In this action the Court of Appeals for the District of Columbia Circuit, while not providing us with an opinion, decided that 1910.132(a) applied to Yellow even though there was no history of any lost time injury, any testimony or showing of industry practice or recognition of a hazard, and no testimony that the affected employees recognized a hazard.

Apparently, Yellow would have prevailed in the First and Fifth Circuits. The Secretary of Labor would prevail in the Eighth and District of Columbia Circuits.

This Court should eliminate such conflicting results. In view of the scope of the applicability of 1910.132(a), the public should be advised of that regulation's meaning and construction.

A. Any Standard Which Requires Compliance With Broad Principles Rather Than With Specifically Defined and Clearly Set Out Acts Which Are Either Proscribed or Required Should Be Construed Under External and Objective Standards Which Are Sufficiently Concrete to Allow Men of Ordinary Competence to Understand the Meaning of the Standard.

The Courts have criticized the language of 1910.132 (a), because the meaning of that standard, as applied to individual work place conditions, cannot be determined from the face of the standard. The standard does not define hazards and does not state, with particularity, what must be done to eliminate those undefined hazards. The Courts have attempted to save the standard by providing varied tests for its application and construction. In spite of these efforts, no reliable guide for the construction of 1910.132(a) has been developed.

Either 1910.132(a) should be found to be too vague for enforcement or a reliable construction should be placed on that standard so that the public will know what it requires. The cases construing 1910.132(a) are widely inconsistent, and so it is applied on the sole basis of the personal opinion of the O.S.H.A. compliance officer who conducts the original investigation at the employer's place of business.

As the Judge said in the case of *Ryder Truck Lines, Inc.*, OSHRC Docket No. 391 (CCH, Emp. S&HG, ¶ 15,284):

> It is recognized that the word "hazard" may be subject to many different interpretations, depending upon the facts and circumstances of each case. This makes it difficult for an employer to know whether he is complying with the law. The problem is further complicated by the fact that the compliance officer does not have any concrete criteria, either statutory or administrative, to guide him in finding a violation. This is the unfortunate result of standards providing only general requirements. The employer is placed in the position of having to guess which employees are exposed to hazards of environment.

Even in the evidentiary hearing in *Ryder Truck Lines, Inc.*, OSHRC Docket No. 391 (CCH, Emp. S&HG ¶ 15,284), wherein the administrative law judge held that Ryder Truck Lines was required to provide safety shoes for dock men because they were exposed to hazards of environment, the decision noted:

> Section 1910.132(a) does not enumerate what employment or jobs shall be classified as hazards of environment. It does not say that loading and unloading of freight is per se a hazardous occupation.

This observation by the Judge indicates the vagueness of the Standard provided in 1910.132(a). The Judge himself notes that it is necessary for an employer to "guess" what is required of him. Such a statement is especially important in light of the language in *Connally* v. *General Construction Co.*, 269 U.S. 385 (1925), where the Court says at 269 U.S. 391:

> . . . and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.

1910.132(a) is so vague as to be meaningless. It is subject to the whim of the compliance officer. It offers no guidance and gives no notice to employers. Accordingly, it is not a permissible standard under § 3(8) of the Act and denies employers in general, and Yellow in particular, due process of law.

Even if this Court should determine that the standard is enforceable, guidelines for construction and a defined external standard should be set out so that the public will know what 1910.132(a) really means.

B. The Conflict in the Circuits Arose Because 29 C.F.R. 1910.132(a) Is So Vague and Indefinite That It Fails to Comply With the Statutory Requirements of the Act, and Therefore Denies Petitioner Due Process of Law Under the Constitution of the United States by Failing to Give Adequate Notice of the Conduct Thereby Mandated or Proscribed.

Section 3(8) of the Act of 1970 reads as follows:

> The term "occupational safety and health standard" means a standard which requires conditions, or the adoption of use of one or more practices, means, methods, operations or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment.

1910.132(a) is worded as follows:

> Protective equipment, including personal protective equipment for the eyes, face, head, and ex-

tremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of process or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.

The Standard does not comply with the requirements for an occupational safety and health standard because it fails to set out any means, methods, operations, processes or practices whatsoever. Further, the regulation fails to state when these are reasonably necessary or appropriate to provide safe or healthful employment or places of employment. As a result, the regulation here in question is an abstract admonition to employers to do good and avoid evil in the area of employee health and safety. As such, it is so impermissibly vague and indefinite as to transcend Constitutional limitations and the confines of the authority delegated by Congress to promulgate safety and health standards under the Act.

1910.132(a) contains no definition of "equipment," no definition of "hazards," no definition of "processes or environment" and no definition of "capable of causing injury or impairment in the function of any part of the body."

C. The Conflict in the Circuits Arose Because the Review Commission Was Arbitrary, Ascribed a Specific and Unsubstantiated Meaning to 1910.132(a), and Applied It to Members of the Freight Handling Industry Without Following Prescribed Rule Making Procedures.

The area of administrative law is growing at a prodigious rate. The Congress can no longer supply the detailed enabling legislation that was once required, *Schecter Poultry Corp.* v. *United States,* 295 U.S. 495 (1935), but some form of control over the discretion of administrative bodies would seem imperative. The trend of thought seems to be in the direction best espoused by Professor Davis to the effect that since administrative agencies have expertise in their appointed areas they should establish their own procedural rules for the enactment and enforcement of regulatory measures, and then abide by those procedural rules. K. Davis, *Discretionary Justice: A Preliminary Inquiry* (1969). It is not always possible for a court to look understandingly into the various substantive rules an agency might adduce, but a court can look and see whether those rules were properly adopted and reasonably enforced. Yellow asks that this Court review the procedure that the Review Commission exercised in reaching its decision. If the Review Commission failed to follow its own procedural rules by creating an industry-wide safety standard by adventurous expansion of a general duty type of standard, then the Court should exercise its supervisory powers and require that proper rule making procedures be followed.

When an agency makes a rule it must follow its own procedures for so doing. In this instance, since there was no existing National Consensus Standard or existing Federal Standard mandating safety shoes for

dock workers, the agency should have proceeded under 29 U.S.C. § 655(b) and the regulations issued thereunder, 29 C.F.R. § 1911, et seq., which provide for a thorough and complete promulgation procedure for a proposed rule, including submission to an advisory committee, publication and a public hearing.

The rule making procedures provided for in the Act are in line with those set forth in the Administative Procedures Act, 5 U.S.C. § 553. The Supreme Court has long expressed a preference for rule making as opposed to adjudication. *SEC* v. *Chenery*, 332 U.S. 194 (1947).

The Secretary of Labor contends that the Review Commission's decision was a simple and permissible adjudication of controverted facts, but it was much more. It was, in effect, the creation of a new safety standard for a whole industry without hearings or industry input as specified by the agency's own rule making procedures. The Review Commission took a vague and nebulous standard and through the medium of an adjudicatory hearing fixed in that standard a meaning that nowhere appears on its face. By so doing, the Review Commission created a *de facto* new standard without regard to its own enunciated procedures for promulgating new standards.

The problem in this case is not one created by Congress in its enabling legislation. The problem is one that lies directly at the doorstep of the Secretary and the Review Commission because they failed in substance to honor Congressional mandate and their own procedural regulations. The decision of the Review Commission was made under color of an existing standard, 1910.132(a) which, as detailed previously in this brief, is excessively vague and indefinite. The decision might

have a basis in fact, like the *Ryder* decision, if the Review Commission had looked into the facts and grounded its decision on them. But the Review Commission chose to ignore the facts. Rather, it stated that the very nature of the work performed by dock workers necessitated safety shoes under 1910.132(a). Such a decision does not logically follow from the wording of the Standard, which nowhere mentions loading docks or safety shoes, or even points in that direction. It does not follow logically from a finding of fact, because there was no such finding. The decision can be nothing but an *ex cathedra* pronouncement of a new standard, and the Review Commission thereby exceeded its authority. In *Environmental Defense Fund, Inc.* v. *Ruckelshaus*, 439 F.2d 584 (D.C. Cir. 1971), the Court stated that "when Congress creates a procedure that gives the public a role in deciding important questions of public policy, that procedure may not be lightly sidestepped by administrators." The Court went on to state at page 598:

> Judicial review must operate to ensure that the administrative process itself will confine and control the exercise of discretion. Courts should require administrative officers to articulate the standards and principles that govern their discretionary decisions as much as possible.

Implicit in the opinion is the requirement that governing standards and principles, once articulated, be observed.

The Review Commission and the Secretary have arbitrarily ignored their own precedents and have adopted an industry-wide standard, calling for a specific safety measure to be taken for all freight handlers. Such a standard should be adopted only by appropriate rule making procedures. By failing to follow its own rule

making procedures the Secretary and the Review Commission abused their discretion.

CONCLUSION

The scope of 1910.132(a) brings the force of that regulation into every work place and covers every employee. As a result of the vague and indefinite language of the standard, O.S.H.A. compliance officers can find violations based solely on their personal opinions, as in the case of Yellow's Tulsa terminal in this action. The Courts of Appeal for the various circuits have been unable to arrive at consistent constructions of 1910.132(a) or consistent guidelines for the application thereof. Such lack of specificity in agency regulation arises where proper rule making procedures are not followed, as in this case in which an industry standard was created by review commission decisions rather than by the Secretary after proper notice and public hearing.

A vague standard coupled with arbitrary enforcement has resulted in such confusion that the public cannot know what is and is not covered by 1910.132(a). This court should act to prevent such arbitrary enforcement by either finding 1910.132(a) void for vagueness or providing a clear and definitive construction thereof.

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1975
No. 75-1483

Yellow Freight System, Inc., Petitioner
v.
Occupational Safety and Health Review Commission, Respondent
Secretary of Labor, Party Respondent

PETITION FOR REVIEW OF AN ORDER OF THE OCCUPATIONAL SAFETY & HEALTH REVIEW COMMISSION

Before: BAZELON, Chief Judge, Wilkey, Circuit Judge and MERHIGE,* United States District Court Judge for the Eastern District of Virginia

JUDGMENT

(Filed February 20, 1976)

This cause came on to be heard on a petition for review of an order of the Occupational Safety and Health Review Commission and was argued by counsel. On consideration of the foregoing, it is

*Sitting by designation pursuant to 28 U.S.C. § 292(d).

ORDERED AND ADJUDGED by this Court that the order of the Occupational Safety & Health Review Commission on review herein is hereby affirmed.

Per Curiam
For the Court
Robert A. Bonner, Clerk
By: /s/ Daniel M. Cathey
Chief Deputy Clerk

APPENDIX B

DECISION

(Filed March 20, 1975)

Before MORAN, Chairman; VAN NAMEE and CLEARY, Commissioners.

VAN NAMEE, Commissioner:

This is another of those cases[1] wherein an operator of a freight dock has been cited for a violation of section 5(a)(2) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 *et seq.*) in that its employees handling freight on the dock and in trucks were not wearing toe protection in alleged contravention of 29 C.F.R. 1910.132 (a). The hearing judge distinguished our decision in *Ryder Truck Lines, Inc., supra.* n.1, saying that here there was no record of relevant work loss. He went on to say that Labor had not proven the existence of a hazard which would require the use of toe protection, and he vacated. Accordingly, he d'd not decide other issues raised in defense. For the reasons given hereinafter, we reject his report and affirm the citation.

The evidence is as follows: Respondent is an interstate hauler of freight and to that end operates a truck terminal in Tulsa, Oklahoma. Freight of various sizes and shapes and weighing up to 6,000 pounds is loaded and unloaded at the terminal dock. Usually the loading and unloading is accomplished with the use of various sized hand trucks and forklifts. However, items weighing about 30-50 pounds are often hand carried and stacked to heights

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1. The lead cases are *Ryder Truck Lines, Inc.*, Dkt. 391, BNA 1 O.S.H.C. 1290, 1326, CCH E.S.H.G. paras. 16,451, 16,669 (Rev. Com'n., 1973), *pet. den., Ryder Truck Lines, Inc.* v. *Brennan*, 497 F.2d 230 (5th Cir., 1974); *McLean Trucking Co.*, Dkt. 2847 (ALJ, 1973), *pet. den., sub nom., McLean Trucking Co.* v. *OSHRC, et al.*, 503 F.2d 8 (4th Cir., 1974).

of about seven feet. It is undisputed that freight falls frequently from stacks located in the trucks and on the dock. It is also undisputed that employees on numerous occasions have had their toes run over by forklifts. Nevertheless, the record shows a low incidence of toe injuries and no lost work time. Respondent's employees do not use toe protection as a rule although some have provided and use such protection on their own initiative.

As said above, the hearing judge distinguished our decision in *Ryder* because of the lack herein of a work-loss record. In our view the difference merely establishes Respondent's good fortune to date. The conditions existing herein are precisely those which did give rise to a lost work time record in *Ryder*. Thus here as there employees were exposed to possible crushing injuries from freight handling equipment.

Here as there freight fell from stacks and while being hand carried thereby exposing employees to possible impact injuries. In the circumstances, we conclude that *Ryder* controls and that Labor has shown the existence of a hazard.

In addition to arguing that Labor failed to prove the existence of a hazard, Respondent also defended saying (1) the standard is vague and unenforceable, (2) that the only employees shown affected by the hazard are subject to regulation by the Department of Transportation (DOT) and (3) application of the cited standard to require use of toe protection in Respondent's operation will impose a burden on interstate commerce.

We have considered each of these arguments and find them to be without merit. We determined that the standard was sufficiently precise to be enforceable in *Ryder*, and that view has been affirmed by two circuits.[2] As to

2. See fn. 1.

the pre-emption issue, we determined in *Southern Pacific Transportation Co.*, Dkt. 1348, BNA 2 O.S.H.C. 1313, CCH E.S.H.G. para. 19,054 (1974), that 29 U.S.C. 653(b)(1) creates an exemption when an agency having statutory authority to regulate employee safety and health conditions exercises the authority and that the burden is on Respondent to show such exercise. Respondent herein has not shown exercise by the DOT of its presumed authority; for example, Respondent does not point to any DOT regulation covering the conditions involved herein and we have not found any such regulation. Accordingly, the defense fails for not having been established. Finally, as to the commerce issue the question is more appropriately directed to Labor's rule-making authority under 29 U.S.C. 655 since it is directed to whether Respondent's industry should be subject to regulation in the first instance.

In view of the foregoing, we find Respondent in non-serious violation of 29 C.F.R. 1910.132(a). Accordingly, the hearing judge's report is rejected; Respondent is in non-serious violation of 29 U.S.C. 654(a)(2) for having violated 29 C.F.R. 1910.132(a) and the citation therefor is affirmed. It is so ORDERED.

MORAN, Chairman, Dissenting:

In view of the recent decision in *Cape and Vineyard Division of the New Bedford Gas and Edison Light Company v. OSAHRC*, ... F. 2d ..... 74-1223 (1st Cir., 1975), I would affirm Judge Risteau's disposition of this case.

The facts in this case are significantly distinct from the facts in *Ryder Truck Lines, Inc., supra*. Here there were two reported foot injuries both of which occurred in spite of the use of "safety shoes," the personal protective equipment believed by the Secretary to be required under the vague and nebulous standard cited herein. Further-

more, unlike *Ryder*, the respondent's employees were lifting materials weighing only 30-40 pounds, not "up to 100 pounds" as in *Ryder*. Only by a stretch of the imagination can the cited standard be said to apply equally to the situation which existed in *Ryder* and the situation existing in respondent's workplace cited herein.

In *Cape and Vineyard, supra,* wherein the personal protective equipment standard was again at issue, the court stated:

> We agree with the dissenting Commissioner that the language of the standard alleged to be violated affords little if any guidance .... (Slip op. p. 6).

Citing *Ryder Truck Lines, Inc., supra,* the court said further:

> A regulation without ascertainable standards, like this one, does not provide constitutionally adequate warning to an employer unless read to penalize only conduct unacceptable in light of the common understanding and experience *of those working in the industry.* (Slip. op. p. 6) (Emphasis added.)

Hence, an employer should not be penalized for exercising the judgment of a reasonable prudent man consonant with the custom and practice of the industry when his workplace may fall within the expansive purview of the standard cited herein. Accordingly, it is not enough to say that this respondent has violated the personal protective equipment standard because he conducts a business similar to *Ryder Truck Lines.* The Secretary must show that an employer did *not* act prudently ". . . in light of the common understanding and experience of those working in the industry. . . .", *Cape and Vineyard, supra,* as well as show what would have been prudent, *National*

Realty & Construction Co. v. *OSAHRC,* 489 F. 2d 1257 (D.C. Cir., 1973), before an employer may be found to have violated 29 C.F.R. § 1910.132(a). Such cumbersome proofs, however, further point out the difficulty of trying to enforce this vague and ambiguous standard. Accordingly, I would affirm.

APPENDIX C

DECISION AND ORDER

(Filed October 16, 1973)

WILLIAM J. RISTEAU, Judge

STATEMENT OF THE CASE

This is a proceeding pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970 [29 USC 651 *et seq.*, hereafter called the Act], contesting a Citation issued by the Complainant against the Respondent under the authority vested in Complainant by Section 9(a) of the Act. The Citation alleges that as the result of an inspection on February 28, 1973, of a workplace under the ownership, operation or control of the Respondent, located at 2319 North Harvard, Tulsa, Oklahoma, and described as a "freight dock", the Respondent violated Section 5(a)(2) of the Act by failing to comply with certain occupational safety and health standards promulgated by the Secretary of Labor pursuant to Section 6 thereof.

The Citation, which was issued on March 13, 1973, alleges that the violations result from a failure to comply with certain standards promulgated by the Secretary by publication in the *Federal Register*, and codified in 29 CFR 1903 and 1910. The description of the alleged violations contained in said Citation states:

Item Number	Standard or regulation allegedly violated	Description of alleged violation
2[1]	29 CFR 1910.132(a)	Protective equipment consisting of personal protective equipment for the feet was not provided and used where necessary by reason of hazard; i.e., safety shoes were not worn by drivers, holsters, and checkers having exposure to foot injury

Regulations promulgated by the Secretary provide as follows:

Item Number	Standard
2	*29 CFR 1910.132* (a) *Application.* Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.

1. Item 1 was not contested.

Pursuant to the enforcement procedure set forth in Section 10(a) of the Act, Respondent was notified by letter dated March 13, 1973, from Robert D. Griffin for J. T. Knorpp, Director of Area 4780, Occupational Safety and Health Administration, U. S. Department of Labor, that he propose to assess no penalty for Item 2 of the Citation.

After Respondent contested this enforcement action and a Complaint had been filed, the case came on for hearing at Tulsa, Oklahoma on July 31, 1973.

DISCUSSION

The outcome here must be governed by the decisions of this Commission in *Secretary* v. *Ryder Truck Lines, Inc.*, OSHRC Docket No. 391, August 16, 1973; Motions for Reconsideration and Stay denied, September 27, 1973. In that case it was held that the employees of another employer, also an interstate motor carrier having dock facilities, must under 29 CFR 1910.132(9) wear safety (steel-toed) shoes while engaged in loading and unloading operations.

As appears particularly in the decision on the Motion for Reconsideration, *Ryder* was decided on the facts, with specific reference to a history of lost work days due to foot and toe injuries extending over a period of several years. The record here is in sharp contrast to this history, for there are no reported instances of relevant work loss, and the record refers to only two occasions when steel-toed shoes may have been a factor in employee safety.

The first of these occurred when the witness Fletcher was unloading a heavy pump from a truck in 1970 or 1972. He was wearing steel-toed shoes by his own preference and not because of company policy at the time, and when the load slipped it rolled over the shoe and bruised his

shin. The heavy load would normally have been handled by a forklift truck, but the only forklift on the scene was not in operation. Mr. Fletcher was seen in the clinic but apparently relied on home treatment and reported for work the next day. (Tr. 46-50)

The other episode involved the witness Shields, who testified that his foot had been run over by a tow-motor some six or eight years previously while he was wearing safety shoes (again by preference). Mr. Shields believes that he might have been injured if he had not been wearing the shoes. (Tr. 86)

This Judge cannot find that these facts constitute in themselves substantial evidence that a hazard exists in Respondent's workplace which would be alleviated by the mandatory wearing of safety shoes. The two episodes occurred over an extended period of time while the large majority of Respondent's dock employees were working unharmed even though their feet were protected only by work shoes. Such isolated instances do not establish a pattern of actual danger such as that discernible in *Ryder*.[2]

Moreover, it would appear from the record as a whole that there exist adequate explanations for Respondent's ability to operate with minimal exposure to injury on the part of its employees. Its operations are largely mechanized, with a variety of equipment geared to loads of different sizes. (R. Ex. 2-17, Tr. 54-56, 73-75, 82, 85, 112-136) It is only the lighter items, weighing up to thirty to forty pounds that are lifted or stacked manually (Tr. 43-44, 48-49, 54-55, 133-135) and the record is devoid of evidence

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2. One of the witnesses, Mr. Wylie, dropped an article on his foot and "smashed [a toe] real bad." The injury was painful but did not interfere with work and required no treatment. (Tr. 70-71) This type of injury does not appear serious enough to warrant application of the cited Regulation.

showing that items of this weight, falling from any of the heights (7 feet to 101 inches) discussed in the testimony, would cause significant foot injury even though safety shoes may not be worn. Thus, while it is beyond dispute that these hand-carried items sometimes fall or are dropped on the dock (Tr. 40, 51, 67, 82-85, 93-94), it has not been shown that this constitutes a hazard of the type which the Act is designed to eliminate. The evidence in support of the Citation therefore fails in a significant respect.

In view of the above considerations, which require a finding for Respondent, no detailed reference will be made herein to its other defenses except to state that the similarity between Respondent's business and that of *Ryder*, as well as Respondent's failure to contest Item 1 of the Citation,[3] indicate a basis for exercise of jurisdiction under the Act in the appropriate factual situation.

FINDINGS OF FACT

1. Respondent was on February 18, 1973, engaged in commerce and transportation among the several states.

2. On February 28, 1973, Respondent operated a freight terminal at 2319 North Harvard, Tulsa, Oklahoma; 23 dock workers and city drivers were employed at that workplace.

3. On February 28, 1973, none of Respondent's dock workers and city drivers wore safety (steel-toed) shoes.

4. On February 28, 1973, Respondent's dock workers and city drivers were not exposed to hazard by reason of their failure to wear steel-toed shoes.

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3. See footnote 3, *Secretary* v. *Mushroom Transportation Co., Inc.*, OSHRC Docket No. 1588, March 30, 1973 (Currently ordered up for review by the Commission).

5. There is no evidence of any of Respondent's employees, as referred to above, losing time from work by reason of their failure to wear steel-toed shoes.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in a business affecting commerce as defined in the Occupational Safety and Health Act of 1970; as such it is subject to the provisions of the Act.

2. The fact that Respondent may be subject to regulation by the Interstate Commerce Commission in some aspects of its operations does not relieve it from the requirement that it comply with the Occupational Safety and Health Act of 1970 in the absence of any showing that Commission has taken action on the particular working condition involved, i.e., the loading and unloading of its vehicles.

3. On February 28, 1973, Respondent was not in violation of 29 CFR 1910.132(a), a Regulation promulgated pursuant to the Occupational Safety and Health Act of 1970.

ORDER

Based on the foregoing findings of fact, conclusions of law, and the entire record, it is ORDERED that Item 2 of the Citation issued herein on March 13, 1973, be, and the same is dismissed; no penalty can be assessed.[4]

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4. Item 1 is affirmed on the basis of Respondent's failure to contest.

APPENDIX D

Occupational Safety and Health Act § 6(b), 84 Stat. 1593, 29 U.S.C. § 655(b)

(b) The Secretary may by rule promulgate, modify, or revoke any occupational safety or health standard in the following manner:

(1) Whenever the Secretary, upon the basis of information submitted to him in writing by an interested person, a representative of any organization of employers or employees, a nationally recognized standards-producing organization, the Secretary of Health, Education, and Welfare, the National Institute for Occupational Safety and Health, or a State or political subdivision, or on the basis of information developed by the Secretary or otherwise available to him, determines that a rule should be promulgated in order to serve the objectives of this chapter, the Secretary may request the recommendations of an advisory committee appointed under section 656 of this title. The Secretary shall provide such an advisory committee with any proposals of his own or of the Secretary of Health, Education, and Welfare, together with all pertinent factual information developed by the Secretary or the Secretary of Health, Education, and Welfare, or otherwise available, including the results of research, demonstrations, and experiments. An advisory committee shall submit to the Secretary its recommendations regarding the rule to be promulgated within ninety days from the date of its appointment or within such longer or shorter period as may be prescribed by the Secretary,

but in no event for a period which is longer than two hundred and seventy days.

(2) The Secretary shall publish a proposed rule promulgating, modifying, or revoking an occupational safety or health standard in the Federal Register and shall afford interested persons a period of thirty days after publication to submit written data or comments. Where an advisory committee is appointed and the Secretary determines that a rule should be issued, he shall publish the proposed rule within sixty days after the submission of the advisory committee's recommendations or the expiration of the period prescribed by the Secretary for such submission.

(3) On or before the last day of the period provided for the submission of written data or comments under paragraph (2), any interested person may file with the Secretary written objections to the proposed rule, stating the grounds therefor and requesting a public hearing on such objections. Within thirty days after the last day for filing such objections, the Secretary shall publish in the Federal Register a notice specifying the occupational safety or health standard to which objections have been filed and a hearing requested, and specifying a time and place for such hearing.

(4) Within sixty days after the expiration of the period provided for the submission of written data or comments under paragraph (2), or within sixty days after the completion of any hearing held under paragraph (3), the Secretary shall issue a rule promulgating, modifying, or re-

voking an occupational safety or health standard or make a determination that a rule should not be issued. Such a rule may contain a provision delaying its effective date for such period (not in excess of ninety days) as the Secretary determines may be necessary to insure that affected employers and employees will be informed of the existence of the standard and of its terms and that employers affected are given an opportunity to familiarize themselves and their employees with the existence of the requirements of the standard.

APPENDIX E

Occupational Safety and Health Act § 17, 84 Stat. 1606, 1607, 29 U.S.C. § 666

(a) Any employer who willfully or repeatedly violates the requirements of section 654 of this title, any standard, rule, or order promulgated pursuant to section 655 of this title, or regulations prescribed pursuant to this chapter, may be assessed a civil penalty of not more than $10,000 for each violation.

(b) Any employer who has received a citation for a serious violation of the requirements of section 654 of this title, of any standard, rule, or order promulgated pursuant to section 655 of this title, or of any regulations prescribed pursuant to this chapter, shall be assessed a civil penalty of up to $1,000 for each such violation.

(c) Any employer who has received a citation for a violation of the requirements of section 654 of this title, of any standard, rule, or order promulgated pursuant to section 655 of this title, or of regulations prescribed pursuant to this chapter, and such violation is specifically determined not to be of a serious nature, may be assessed a civil penalty of up to $1,000 for each such violation.

(d) Any employer who fails to correct a violation for which a citation has been issued under section 658(a) of this title within the period permitted for its correction (which period shall not begin to run until the date of the final order of the Commission in the case of any review proceeding under section 659 of this title initiated by the employer in good faith and not solely for delay or avoidance of penalties), may be assessed a civil penalty of not

more than $1,000 for each day during which such failure or violation continues.

(e) Any employer who willfully violates any standard, rule, or order promulgated pursuant to section 655 of this title, or of any regulations prescribed pursuant to this chapter, and that violation caused death to any employee, shall, upon conviction, be punished by a fine of not more than $10,000 or by imprisonment for not more than six months, or by both; except that if the conviction is for a violation committed after a first conviction of such person, punishment shall be by a fine of not more than $20,000 or by imprisonment for not more than one year, or by both.

(f) Any person who gives advance notice of any inspection to be conducted under this chapter, without authority from the Secretary or his designees, shall, upon conviction, be punished by a fine of not more than $1,000 or by imprisonment for not more than six months, or by both.

(g) Whoever knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained pursuant to this chapter shall, upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than six months, or by both.

(h) Any employer who violates any of the posting requirements, as prescribed under the provisions of this chapter, shall be assessed a civil penalty of up to $1,000 for each violation.

(i) The Commission shall have authority to assess all civil penalties provided in this section, giv-

ing due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations.

(j) For purposes of this section, a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

(k) Civil penalties owed under this chapter shall be paid to the Secretary for deposit into the Treasury of the United States and shall accrue to the United States and may be recovered in a civil action in the name of the United States brought in the United States district court for the district where the violation is alleged to have occurred or where the employer has its principal office.